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IN THE

Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
Petitioner,

—v.—

NEWTOWN TOWNSHIP AND
THE ZONING HEARING BOARD OF NEWTOWN TOWNSHIP,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

REPLY TO BRIEF IN OPPOSITION 1

1. Telecommunications Facilities Are Not Permitted Anywhere Within the Township. 1

2. The Conflict Is Real. 3

3. The Third Circuit's Decision Is Anti-Competitive. 5

4. This Case Is Ideally Suited for Review. 6

5. The Third Circuit's Approach Frustrates the Recent Public Safety Legislation. 8

CONCLUSION 8

TABLE OF CITED AUTHORITIES

CASES

360 degrees Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County, 211 F.3d 79 (4th Cir. 2000) 3

APT Pittsburgh Ltd. P'ship v. Penn Township, 196 F.3d 469 (3d Cir. 1999) 1, 7

Omnipoint Communications Enter., L.P. v. Newtown Township, 219 F.3d 240 (3d Cir. 2000) 3, 6

Omnipoint Communications Enter., L.P. v. Newtown Township, No. 98-CV-5171, 1999 WL 269936 (E.D. Pa. Apr. 29, 1999) 2, 3, 4, 7

Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999) 4, 5

Town of Amherst, N.H. v. Omnipoint Communications Enter., Inc., 173 F.3d 9 (1st Cir. 1999) 5

STATUTES AND RULES

47 U.S.C. § 332(c)(7)(B)(i)(II) 4

Fed. R. Civ. P. 56 ..... 2, 7

Pub. L. No. 106-81, § 2(b) (1999) 8

MISCELLANEOUS

An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, 86 F.C.C.2d 469 (1981) 6

Newtown Township, Pa., Zoning Code § 172 (Jan. 6, 1997) 2, 3

REPLY TO BRIEF IN OPPOSITION

Petitioner, Omnipoint Communications Enterprises, L.P. ("Omnipoint"),[1] submits this reply brief to correct certain inaccuracies within the Brief of Respondents in Opposition to Petition for Writ of Certiorari ("Respondents' Brief").

For the convenience of the Court, each section of Respondents' Brief will be addressed in turn. However, it is important to note at the outset that the purported factual issues raised by respondents had nothing to do with the court of appeals' decision. The sole basis for reversal was the "all carriers" requirement imposed by APT Pittsburgh Ltd. P'ship v. Penn Township, 196 F.3d 469 (3d Cir. 1999). As explained below, respondents' contentions about alternative sites are unsupported and untrue. But more importantly, they have no bearing on the suitability of this case for review. See section 4 below.

1. Telecommunications Facilities Are Not Permitted Anywhere Within the Township.

In their Counter-Statement of the Case and Introduction, respondents boldly assert, without any support, that telecommunications facilities are allowed at several locations within the Township, "including two light industrial zoning districts and a special use (SU2) district." Respondents' Brief at 4. That is just plain wrong, as demonstrated by the record and the district court's findings.

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[1] The Corporate Disclosure Statement included within Omnipoint's Petition for Writ of Certiorari is incorporated herein by reference.

Due to a combination of use and height restrictions, telecommunications facilities are not allowed *anywhere* in Newtown Township. See Omnipoint Communications Enter., L.P. v. Newtown Township, No. 98-CV-5171, 1999 WL 269936, at *4 (E.D. Pa. Apr. 29, 1999) ("Newtown I") ("Plaintiff is therefore precluded from placing the antennas that it needs to provide coverage anywhere within the Township.") (App. 23a).

It was stipulated at the zoning hearing that such facilities "might possibly" be a permitted use *only* in a light industrial district, which would be the case only if they were deemed to be the equivalent of a "microwave tower" (a dubious assumption, at best).[2] See Newtown Township, Pa., Zoning Code § 172-82 (Jan. 6, 1997) ("Zoning Code") (App. 60a). Moreover, the only light industrial district where the antennas would be capable of providing the required service was unavailable, because a single entity owned the entire district and was unwilling even to discuss the possibility of entering into a lease with Omnipoint given the Township's reservation of the right to use the land for a highway bypass. See Newtown I at *4 (App. 23a).

More importantly, even if telecommunications facilities were a permitted use in the light industrial district and the property were available, the zoning ordinance still

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[2] Despite respondents' naked assertions to the contrary, there was no evidence that the facility would be allowed in a "special use" district. See Newtown I at *4 ("There was no testimony indicating that the antennas were permissible within the Special Use districts and no testimony regarding what property was located within these districts.") (App. 23a). If there were any such evidence, respondents were required to submit it in opposition to Omnipoint's motion for summary judgment. See Fed. R. Civ. P. 56(e). Their failure to do so speaks volumes.

would bar an installation there, because the antennas would have to be mounted on a freestanding tower that would exceed the ordinance's height limitation. See Zoning Code § 172-83.C (prohibiting any "building" more than 45 feet tall) (App. 62a); Zoning Code § 172-1 (defining "building" to include any "structure") (App. 58a).

Accordingly, the district court correctly found that the Zoning Code does not allow telecommunications facilities anywhere within Newtown Township. See Newtown I at *4 (App. 22a). The record below could not support any other conclusion.

2. The Conflict Is Real.

Respondents also contend that the conflict among the circuits is illusory. In essence, they attempt to reconcile the cases by arguing that the fourth circuit's "general ban" rule applies to cases of *per se* prohibition and the third circuit's "significant gap" rule applies to all others.

That ignores the fact that the fourth circuit disagrees with the significant gap approach and the third circuit disagrees with the general ban approach. Neither court will use the other's approach under any circumstances. See 360 degrees Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County, 211 F.3d 79, 87 (4th Cir. 2000) (flatly rejecting the significant gap analysis); Omnipoint Communications Enter., L.P. v. Newtown Township, 219 F.3d 240, 244 n.3 (3d Cir. 2000) (holding that the prohibition of sites everywhere was "unavailing") (App. 10a).

The third and fourth circuits' approaches are irreconcilable, because they would lead to different results

when applied to the same facts. Indeed, they would lead to different outcomes in this very case. Because the zoning ordinance here does not allow telecommunications facilities anywhere within Newtown Township, it is a "general ban" and would violate the Telecommunications Act[3] under the fourth circuit's test. Nevertheless, the third circuit held that the ordinance cannot be found violative of the Act unless all other carriers also are without service in the same area.[4]

It also is inaccurate to suggest that the second and third circuits would reach the same result. As ably explained in the proposed *amicus* brief filed by Sprint Spectrum L.P., the second circuit did not impose the "all carriers" requirement in Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999). In fact, it did just the opposite, by holding that the municipality's previous approval of another carrier's application to serve the same area was not sufficient to defeat Sprint's prohibition claim. Id. at 640. Under the second circuit's approach, the district court's decision here would have been upheld, because Omnipoint has been

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[3] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[4] It is quite possible that other carriers may have service in Newtown Township notwithstanding the general ban. For example, the original cellular carriers may be able to reach the area from outside the township because analog technology works over longer distances. In addition, other digital carriers appear to have installed facilities in violation of the ordinance. See Newtown I at *4 ("The fact that the Township has looked the other way in the placement of these antennas does not alleviate the fact that according to its ordinance, the use is not permitted.") (App. 22a).

precluded from filling a significant gap by the least intrusive means.[5]

Nor is the first circuit in full accord with the fourth. The first circuit would be much more apt to consider evidence that further applications would be futile. See Town of Amherst, N.H. v. Omnipoint Communications Enter., Inc., 173 F.3d 9 (1st Cir. 1999).

In short, the conflicting standards applied by the first, second, third and fourth circuits produce different outcomes in a variety of common circumstances, including those presented by this case. That has created an urgent need for Supreme Court intervention.

3. The Third Circuit's Decision Is Anti-Competitive.

Respondents also argue that the third circuit's approach is not anti-competitive because carriers could all use each other's facilities if they would just standardize the technology. Of course, that ignores the fact that each carrier is licensed to operate within a unique range of frequencies.

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[5] The antennas were to be installed on the roof of a six-story building inside an inconspicuous fiberglass canister that was only 5½ feet tall and 18 inches wide. It is difficult to imagine any installation less intrusive than that, and none have been proffered.

In addition, it should be noted that Willoth borrowed the "least intrusive means" concept from New York's state zoning law. That should not have been "federalized" because it is inconsistent with state law in other jurisdictions. Congress meant to leave state zoning law alone, except to the extent it prohibits service or otherwise violates the Act.

Even if all other carriers used GSM[6] technology like Omnipoint, each carrier would still need its own network tuned to its own frequency range.[7] Even more importantly, standardization would end competitive innovation, which is one of the Act's principal goals.

4. This Case Is Ideally Suited for Review.

The court of appeals' decision in this case was based entirely upon the "all carriers" requirement. See Newtown at 245 ("we must return this matter to the District Court for the application of the appropriate standard.") (App. 11a). The "all carriers" requirement is in direct conflict with the standards applied by several other courts of appeals (which also conflict with each other). That makes this case an ideal vehicle for addressing the circuit splits and clarifying the applicable standard for prohibition claims.

Respondents attempt to obscure that irrefutable point by arguing an inaccurate version of immaterial facts.

For example, respondents argue at length that other locations could have been used instead of Newtown Towers. Omnipoint proved at the zoning hearing that those locations would not be capable of providing the required service, but none of that matters because the installation would not be

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[6] GSM is the acronym for Groupe Speciale Mobile (or Global Standard for Mobile communications), which is the internationally prevalent standard.

[7] Licensing multiple providers for the same frequency range has been rejected by the FCC as unworkable. See An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, 86 F.C.C.2d 469, 477-78 (1981).

allowed at any of them anyway. See Newtown I at *4 (App. 23a).

Respondents also contend that Omnipoint "has never argued that it was discriminated against vis-a-vis other carriers." Respondent's Brief at 15. That also is untrue. Omnipoint asserted a discrimination claim, but it was denied by the district court because respondents treated another carrier just as badly as Omnipoint.[8] See Newtown I at *3 (App. 20a).

Let us not forget that the district court granted a summary judgment in Omnipoint's favor because the facts about which there was no genuine dispute entitled Omnipoint to a judgment as a matter of law. See Newtown I (App. 15a); Fed. R. Civ. P. 56. That ruling was not disturbed by the court of appeals for any purpose other than application of the new "all carriers" requirement. If this Court concludes that the court of appeals was wrong to impose that requirement, the district court's decision in Omnipoint's favor can simply be affirmed. If, instead, this Court agrees with the court of appeals or imposes some other new standard, the case can be remanded for further proceedings consistent with the Court's opinion. There is nothing unusual about those options that would make this case unsuitable for Supreme Court review.

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[8] This shows why the anti-discrimination provision of the Act is no substitute for the anti-prohibition provision, as the third circuit seems to have believed. See APT at 480 n.8 (3d Cir. 1999) ("even if the area to be served is already served by another provider, the TCA may invalidate the denial of a variance if it has the effect of unreasonably discriminating between providers").

5. The Third Circuit's Approach Frustrates the Recent Public Safety Legislation.

Respondents also contend that the Wireless Communications and Public Safety Act of 1999 ("Public Safety Act"), Pub. L. No. 106-81, § 2(b) (1999), has no bearing on this case because "the main purpose of the bill was to standardize the use of 9-1-1 for emergency calls." See Respondent's Brief at 20. They seem to have missed the point.

Congress made the deployment of wireless networks a national priority so 9-1-1 calls could be made anywhere with any phone. That priority is frustrated by the third circuit's "all carriers" requirement, because it allows local officials to keep most providers out of their municipalities. The resulting patchwork would deprive many users of service at many locations. As a result, 9-1-1 service would not be anywhere near as ubiquitous as the Public Safety Act intends. That impact of the court of appeals' decision on Congress' life-saving goals is but one of several reasons why this case is important enough to warrant Supreme Court review.

Indeed, the exceptional importance of this case has been confirmed by the filing of motions for leave to file *amicus* briefs on behalf of five major competitors of Omnipoint. This issue is tremendously important to the entire wireless communications industry and the 80 million subscribers they represent.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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